

Internal Revenue Service
memorandum

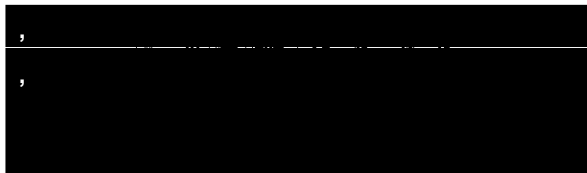
date: DEC 13 1991

to: Director, Internal Revenue Service Center
Kansas City, MO
Attn: Entity Control

from: Technical Assistant
Employee Benefits and Exempt Organizations

subject: CC:EE:3 - TR-45-1859-91
Railroad Retirement Act Status

Attached for your information and appropriate action is a copy of a letter from the Railroad Retirement Board concerning the status under the Railroad Retirement Act and the Railroad Unemployment Insurance Act of:



We have reviewed the opinion of the Railroad Retirement Board and, based solely upon the information submitted, concur in the conclusion that [REDACTED] is not a covered employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. In addition, the individuals working for [REDACTED] for rail carriers are not employees under the Acts.

(Signed) Ronald L. Moore

RONALD L. MOORE

Attachment:

Copy of letter from Railroad Retirement Board

cc: Mr. Gary Kuper
Internal Revenue Service
200 South Hanley
Clayton, MO 63105

08667

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 RUSH STREET
CHICAGO, ILLINOIS 60611

BUREAU OF LAW

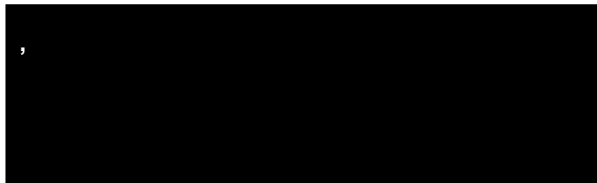
Assistant Chief Counsel
(Employee Benefits and
Exempt Organizations)
Internal Revenue Service
1111 Constitution Avenue., N.W.
Washington, D.C. 20224

OCT 04 1991

Attention: CC:IND:1:3

Dear Sir:

In accordance with the coordination procedure established between the Internal Revenue Service and this Board, I am enclosing for your information a copy of an opinion in which I have expressed my determination as to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of the following:



Sincerely yours,

A handwritten signature in cursive script, appearing to read "Steven A. Bartholow".

Steven A. Bartholow
Deputy General Counsel

Enclosure

UNITED STATES GOVERNMENT

RAILROAD RETIREMENT BOARD

MEMORANDUM

L - [REDACTED]

OCT 03 1991

TO: Director of Research and Employment Accounts

FROM: Deputy General Counsel

SUBJECT: [REDACTED]
Employer Status

This is in reply to your Form G-215 dated August 21, 1991, requesting my opinion regarding the employer status of [REDACTED]. This company has not previously been held to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

The following is based on information provided in a letter of July 30, 1991, from [REDACTED], attorney for The [REDACTED], a covered employer under the Acts, and a letter of June 26, 1991, from [REDACTED].

[REDACTED] began operations on [REDACTED]. [REDACTED] describes its operations as follows.

"Draw wiring diagrams on computers.
Convert old style linen or mylar tracings to CADD format on Intergraph and Macintosh computers.
Design signal warning plans for railroads.
Design signal traffic control systems for railroads,
give technical advice to contractors.
Draw preliminary engineering plans for consultants."

[REDACTED]'s work is performed on [REDACTED] premises under the direction of [REDACTED] staff. [REDACTED] percent of [REDACTED]'s work is for railroads and [REDACTED] performs work for a number of other railroads in addition to work for [REDACTED]. According to [REDACTED], [REDACTED] does not have an ongoing contract to provide services for [REDACTED], but rather obtains its work with [REDACTED] (and other companies) through a bid process with respect to individual projects. [REDACTED] may suffer a loss if its expenses exceed its clients' agreed payments pursuant to its bids.

Director of Research and Employment Accounts

Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 U.S.C. § 231(1)(a)(1)), insofar as relevant here, defines a covered employer as:

"(i) any express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act;"

"(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad
* * *."

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231).

████ clearly is not a carrier by rail, and hence does not meet the first definition of covered employer. Further, the evidence developed through correspondence and telephone contact shows █████ to be a closely held company that is neither under common ownership with any rail carrier nor controlled by officers or directors who control a railroad. It is therefore my opinion that █████ is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for █████ under its arrangements with █████ or other rail carriers should be considered to be employees of those railroads rather than of █████. Section 1(b) of the RRA and section 1(d) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

"(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

Director of Research and Employment Accounts

(ii) he renders such service for compensation* * *."

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

The definition set forth under paragraph (A) may generally be described as the common law test. The focus of this test is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also the way he performs such work. The evidence developed shows that [REDACTED]'s work is performed on [REDACTED] premises under the directions of [REDACTED] staff; accordingly, the control test in paragraph (A) is not met in this case. The tests set forth under paragraphs (B) and (C) go beyond the common law test and would hold an individual a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. In practice, this office in applying paragraphs (B) and (C) has followed Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953), and has not used paragraphs (B) and (C) to cover employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business and the arrangement has not been established primarily to avoid coverage under the Acts.

The first question remaining to be answered therefore is whether [REDACTED] itself may be considered to be a truly independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has an opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl., 1977), at 1012; and whether the contractor engages in a recognized trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir., 1968), at 341. [REDACTED] clearly has some investment in plant and equipment and may suffer a loss if expenses under its contracts exceed the agreed payment. Moreover, the work for [REDACTED] represents only a portion of total [REDACTED] revenues, which indicates that [REDACTED] is in the business of providing services to the rail industry as a whole and that [REDACTED] is an independent business.

Director of Research and Employment Accounts

The second question presented is whether the [REDACTED] contract is primarily intended to avoid coverage under the Railroad Retirement and Railroad Unemployment Insurance Acts. There is no evidence that any individuals were directly removed from coverage under the Acts and placed in employment covered under the Social Security Act. [REDACTED]'s own service and compensation record shows railroad service into [REDACTED], after [REDACTED] began operations, and although he had formerly been an employee of [REDACTED], there is no evidence of the existence of any agreement between him and [REDACTED] providing for him to leave [REDACTED] and thereafter provide services to it; such a agreement would be inconsistent with the method by which [REDACTED] obtains its contracts.

A decision by the Board on a question of fact must be based upon evidence which a reasonable mind would accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 399 (1971), at 401. A factual determination based on circumstantial evidence should reasonably follow from the circumstances considered. Cf. Peterson v. United States Railroad Retirement Board, 780 F. 2d 1361 (8th Cir., 1985), at 1364 (Board may not infer merely from unencumbered home ownership that a claimant has the ability to repay an overpayment of benefits). I do not believe the facts and circumstances surrounding [REDACTED]'s work for rail carriers, as discussed above, are adequate to support a conclusion that the rail carriers primarily entered into those arrangements to avoid coverage, to the exclusion of other business purposes such as handling workloads beyond existing capacity.

Because [REDACTED] engages in an independent business and its arrangements to perform services for rail carriers do not appear to primarily have been concluded to avoid coverage under the Acts, Kelm would prevent applying paragraphs (B) and (C) of the definition of covered employee to this case. The last question presented here therefore is whether the individuals working for [REDACTED] in performing services for rail carriers are subject to the direction and control of [REDACTED] or other rail carriers in the "manner of rendition" of their service. As mentioned above, those individuals perform their service on the premises of [REDACTED] and do not supervise and are not supervised by railroad employees. Accordingly, there is no basis to find that the service performed by [REDACTED] for rail carriers meets the definition of employee service under the Acts.

An appropriate Form G-215 is attached.



Steven A. Bartholow

Attachment

MCLitt:ldj
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